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716139—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 275

PANHANDLE EASTERN PIPE LINE COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION, CITY OF DETROIT, COUNTY OF WAYNE, MICHIGAN, MICHIGAN CONSOLIDATED GAS CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 489–496) is reported at 154 F. 2d 909.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 5, 1946 (R. 497–498). The petition for a writ of certiorari was filed on July 5, 1946. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In a proceeding in the Circuit Court of Appeals to review and set aside a rate-reduction order of the Federal Power Commission, a natural-gas company sought and was granted a stay of the order pending review thereof. The stay was conditioned upon the requirement that the company bear the cost of distributing to the ultimate consumers the funds accumulated pursuant to such stay. The stay order did not require the company to pay interest on such funds. The rate-reduction order having been reviewed and upheld by the Circuit Court of Appeals and by this Court, the natural-gas company sought to have the Circuit Court of Appeals modify the stay order so as to relieve it of its obligation to pay the cost of distributing the funds to ultimate consumers. Distributing companies disclaimed their rights in such funds and admitted that ultimate consumers were entitled thereto. The Circuit Court of Appeals refused to modify its stay order, except to provide that the natural-gas company could apply against distribution costs the earnings on the funds distributed.

The question presented is whether in those circumstances, the order of the Circuit Court of Appeals refusing to modify its stay order so as

to relieve the natural-gas company from the requirement that it pay the distribution costs amounted to an abuse of discretion.

STATEMENT

The Federal Power Commission ("Commission") on September 23, 1942, issued an order requiring Panhandle Eastern Pipe Line Company ("Panhandle") [1] to reduce its rates and charges subject to the jurisdiction of the Commission to reflect a reduction in gross operating revenues, based on 1941 operations, of not less than $5,094,384 *per annum* (R. 37–42).

When the Commission denied Panhandle's motion for rehearing and its application for a stay pending court review (R. 42–53), Panhandle applied to the Circuit Court of Appeals for a stay of the Commission's order (R. 53–74). On November 2, 1942, that court issued an order directing respondents to show cause why a stay should not be granted, and suspended the Commission's order until the question of the stay had been determined (R. 74–75).[2] It was urged in opposition to the proposed stay that as a result thereof

[1] The original order was also directed against Illinois Natural Gas Company and Michigan Gas Transmission Corporation, which were merged with Panhandle on May 31, 1943.

[2] On November 14, 1942, the court denied without prejudice Panhandle's application for a stay upon the ground that its appeal had not been perfected (R. 85–86). Panhandle perfected its appeal on November 18, 1942 (R. 1), renewed its request for a stay (R. 86–88), and on November 23, 1942, the court granted a temporary stay (R. 118).

distributing utilities would be unable voluntarily to reduce rates to ultimate consumers to reflect the reduced cost of gas under the rate-reduction order and that State regulatory authorities would also be unable to order a reduction in local rates commensurate with the reduced cost of gas to the distributing utilities.[3] Alternatively, it was urged that if a stay were granted the court should condition it by requiring that Panhandle pay the expenses of distributing accumulated funds to ultimate consumers, in the event that the rate-reduction order should be sustained (R. 84–85, 115).

On December 7, 1942, the Circuit Court of Appeals stayed the Commission's rate-reduction order, the stay order providing that (R. 119–120):

> 1. The monthly difference between payments to petitioners under existing rates or arrangements and those required under the order of the Commission shall be promptly paid over to * * * the custodian of this Court, * * * to be held by him for the benefit of the ultimate consumers or of petitioners as in this litiga-

[3] In opposing the stay, Michigan Consolidated Gas Company, which served over 700,000 ultimate consumers, and was the largest gas distributing company supplied by Panhandle, argued that (R. 115):

"* * * it would seem that there is no valid reason for impounding millions of dollars of funds which belong to and must be returned at great expense to an already overburdened public."

tion may be determined entitled thereto. * * *

2. The entire expenses of impounding (including, among other things, protecting, investing and distributing to petitioners or to ultimate consumers) of these funds shall be borne by petitioners. Whether any earnings on such funds (while so impounded) may be applied upon such expenses is reserved for future determination. * * *

3. No interest shall be charged petitioners upon such impounded funds unless allowed upon application hereafter made by respondents or any of them. * * * Any interest allowed hereafter shall be at the rate of four percentum annually * * *.

4. Full power and jurisdiction is reserved to cancel or modify this order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers financially interested in the impounded funds.

While the question was pending in the courts, Panhandle made the required monthly deposits with the custodian and a fund amounting to $24,858,954.72 has been accumulated (R. 169–171).[4] On April 2, 1945, the Commission's order

[4] The total monthly deposits made pursuant to the stay order was $24,307,475.99; an additional amount of $551,478.73 was paid to the custodian by Panhandle.

was affirmed by this Court and the matter was remanded to the court below (R. 144–146). *Panhandle Co.* v. *Federal Power Commission,* 324 U. S. 635. Panhandle thereafter filed new schedules of rates and charges with the Commission containing rates and charges reflecting the ordered reduction (R. 167–168, 170–171).

On December 12, 1945, the Circuit Court of Appeals, upon the petition of the United States which claimed a substantial interest in the fund as an ultimate consumer of natural gas and as an indirect consumer through its war contracts (R. 147–163), issued an order requiring the original parties to the proceeding, the interveners, and distributing utilities to show cause why the impounded funds should not be distributed to the ultimate consumers of the distributing utilities (R. 146–147). In response thereto, distributing utilities whose purchases from Panhandle during the impoundment period were associated with refunds amounting to approximately $20,000,000 filed disclaimers of all interest in the fund on the condition that they thereby not incur any liability for state or federal taxes or for expenses of distribution; claims for refunds were filed by a few distributors; the others made no response.

In its response to the show cause order of December 12, 1945, Panhandle sought to invoke the power reserved to the court to modify the stay order by requesting relief from those terms

of the original stay which obligated it to pay the cost of distributing the funds to ultimate consumers (R. 164–166). Hearings were held on Panhandle's petition on March 1, 1946 (R. 448–474),[5] and on April 5, 1946, the Circuit Court of Appeals, Judge Riddick dissenting, refused to relieve Panhandle of the costs of distributing the fund to the ultimate consumers, which were estimated at $1,157,150, but modified the stay order so as to apply the earnings of the fund, then amounting to $344,925.63, against the distribution expenses (R. 489–496).

ARGUMENT

1. In seeking review of the Circuit Court of Appeals' refusal to relieve it of the costs of distributing the accumulated funds to the ultimate consumer, Panhandle does not deny that a court in granting a stay has discretion to impose "terms and conditions upon the party at whose instance it proposes to act" (*Russell* v. *Farley*, 105 U. S. 433, 438; *Meyers* v. *Block*, 120 U. S. 206, 214; *Inland Steel Co.* v. *United States*, 306 U. S. 153, 156, 157; *United States* v. *Morgan*, 307 U. S. 183, 197–198), nor that it is a common condition of such stays to require the petitioner to pay the resulting costs and expenses. See, e. g., Rule 36 of the Rules of this Court; Rule

[5] Two of the members of the court which entered the original stay order sat at these hearings, but in an advisory capacity only (R. 495).

73 (d), F. R. Civ. P.; cf. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry.*, 249 U. S. 134, 145–146; *Martin* v. *Clarke*, 105 F. 2d 685, 687 (C. C. A. 7), and cases cited; *United States Fidelity and Guaranty Co.* v. *Jones*, 49 F. 2d 559, 562–563 (C. C. A. 7). But Panhandle does question (Pet. 19–20, 23–24) the requirement by the court below that it "hold harmless the ultimate distributees of these funds from the costs and expenses attributable to the granting of the stay which Panhandle sought and which this Court could have denied" (R. 494). In the circumstances of this case, however, we submit that this requirement could not possibly constitute an abuse of discretion.

Panhandle sought the stay for its own benefit to insure it against "irrevocable loss" (R. 69) in case it were successful in reversing the Commission's order, for, as alleged in its petition, if the order were not stayed, the difference between the old rates and the new reduced rates would probably have been dissipated among the hundreds of thousands of consumers served by its customer-distributing utilities and therefore would be recoverable, if at all, only through a multiplicity of suits and at prohibitive expense (R. 68–69). Panhandle had further suggested that the stay, if granted, should provide for the return of the impounded funds to ultimate consumers, as well as others named (R. 71–72).[6]

[6] Panhandle's present contention (Pet. 20–21) that the distribution costs be paid from the impounded fund attempts

The effect of thus maintaining the *status quo* for Panhandle's protection was to postpone, until after court review, all possibility that distributing utilities might voluntarily and immediately reduce rates to ultimate consumers as Panhandle feared (R. 68–69). Moreover, the stay prevented State regulatory agencies as well as ultimate consumers during the period of litigation, from attacking as "unlawful" the local distribution rates based on the reduced cost of purchased gas. Cf. *United States* v. *Morgan, supra,* at 193, 194; *Ex parte Lincoln Gas Co.,* 256 U. S. 512, 516–517. Such reductions in local distribution rates to reflect savings in the cost of gas ordered by the Federal Power Commission, whether made voluntarily or by order of a State regulatory agency, would apparently have been made promptly and without litigation, as is indicated by the large number of disclaimers filed by the distributing utilities (R. 262–343).

Although rules of various courts require that a party granted a stay pay not only damages for delay but interest on the monies involved as well (Rule 36 of the Rules of this Court; cf. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry.,* 249 U. S. 134, 147; *Ex parte Lincoln Gas Co.,* 256

to shift the costs to the ultimate consumers who neither sought, nor benefited from, the stay. The argument urged by Panhandle, based on the lack of privity of contract with the ultimate consumers, is unsound. Cf. *Ex parte Lincoln Gas Co.,* 256 U. S. 512, 517–518.

U. S. 512, 517; *Natural Gas Pipeline Co.* v. *Federal Power Commission,* 129 F. 2d 515 (C. C. A. 7)), the court below did not require Panhandle to pay interest on the impounded funds, as it might reasonably have done—a requirement which, as pointed out by the court below, "might well have been more burdensome than the requirement that [Panhandle] pay the expenses of distribution" (R. 494). Moreover, the estimated costs of distribution, less the earnings on the fund, are only 3.15 percent of the total fund of almost $25,000,000 accumulated under the stay.

Considering these circumstances, the requirement of the court below that Panhandle pay these distribution costs was not only not an abuse of discretion, but was eminently fair and reasonable.

2. As pointed out by the court below, the conditions upon which the stay was granted—that the difference between the then existing rates and those required under the Commission's order be accumulated "for the benefit of the ultimate consumers",[7] and that Panhandle bear "The entire expenses of impounding (including, among other things, protecting, investing and distributing to petitioners or to ultimate consumers) * * *"—were at that time "acceptable to, and were accepted by, Panhandle" (R. 490, 494). Although

[7] Panhandle in its petition for stay suggested that the funds be impounded, "such amounts to be returned to such ultimate consumers of gas or other persons, firms or corporations to whom this Court shall find the same should be returned * * *" (R. 71–72). See, *supra*, p. 8.

Panhandle was aware of the burden it was assuming, it neither objected to, nor sought relief from, these conditions in the Circuit Court of Appeals. Nor did it seek review of these conditions in this Court as part of its review of the Commission's rate reduction order. See the Petition in No. 296, Oct. T. 1944. Cf. *The Scotland,* 118 U. S. 507, 519; *Citizens' Bank* v. *Cannon,* 164 U. S. 319, 323. Instead, during the three years that review of the Commission's order was pending in the court below and in this Court, Panhandle enjoyed the benefits of the suspension of the Commission's order; now that the litigation is ended, Panhandle seeks review of the court's requirement, imposed in the exercise of its discretion at the inception of this litigation, that, as a condition of the stay, Panhandle bear the distribution costs. Cf. *Inland Steel Co.* v. *United States, supra,* at 156–157. Incorporation of such a condition in a stay order, involving only the exercise of discretion, is not separately reviewable. *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78, 82–83, and cases cited. Moreover, refusal to modify the original stay order at this late stage does not give rise to an independent proceeding supplemental to the original proceeding. Review of such refusal thus appears foreclosed.[8] Cf. *Kansas City Southern*

[8] In the light of the full judicial review already had (143 F. 2d 488; 324 U. S. 635; 325 U. S. 834, 892), Panhandle's present claim that the condition of the stay "in practical effect, operates as an unconstitutional restraint upon the right of access to the courts" (Pet. 22), is clearly without substance, and might fairly be characterized as frivolous.

Ry. v. *Guardian Trust Co.*, 281 U. S. 1; *Canter* v. *American Insurance Co.*, 3 Pet. 307, 317.

3. The decision below does not run counter to *Central States Electric Co.* v. *City of Muscatine*, 324 U. S. 138. In that case, this Court held that where a distributing utility claimed the right to participate in the distribution of the accumulated fund to the exclusion of its customers, the Circuit Court of Appeals was without authority to determine the rights of such customers *vis à vis* the distributing utility upon the ground that such a determination constituted rate making. Here, no such issue is or could be raised, since the court below has not undertaken to resolve any such conflicting claims. Nor is any question of rate making involved in the refusal by the court below to modify its stay order. Moreover, prior to the decision of this Court in the *Central States* case, the Circuit Court of Appeals for the Seventh Circuit in *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 129 F. 2d 515—the case which gave rise to the issue in the *Central States* case—had held, in the exercise of its discretion, that in the circumstances there presented the company should not be required to bear distribution expenses.

Nor does the decision of the court below conflict with that of the Circuit Court of Appeals for the Seventh Circuit in the *Natural Gas Pipeline* case. There the stay bond was filed "to secure the refund to purchasers at wholesale of

the amounts respectively due them if the Court should sustain the reduction of rates ordered by the Commission," and the distribution costs were neither imposed upon nor voluntarily assumed by the utility as part of the original stay bond. The court there recognized that it was "directed by [*United States* v. *Morgan,* 307 U. S. 183] to apply equitable principles and to produce and accomplish results which are fair and equitable;" it first charged the company with interest on the accumulated fund, and then held that "Under the facts in this case, we are unable to say that the petitioners should be charged with the expenses of the distribution." 129 F. 2d at 516.

In the present case, however, the funds from the start were to be held "for the benefit of the ultimate consumers"; the stay order sought by Panhandle initially imposed the expenses of distribution on it; and Panhandle was relieved of interest payments which the court below found "might well have been more burdensome than the requirement that it pay the expenses of distribution" (R. 494). "Under the facts in this case," the refusal of the court below to relieve Panhandle from its obligation to pay the distribution costs was a proper exercise of discretion. The court below and, in the *Natural Gas Pipeline* case, the Circuit Court of Appeals for the Seventh Circuit, were confronted with a practical problem of judicial administration, requiring the exercise of discretion. Although each court imposed

slightly different requirements on the company which was granted a stay pending court review, the conclusions arrived at in each case—that the company bear a reasonable portion of the "damages for delay"—are substantially the same.

CONCLUSION

The decision of the court below was correct, reasonable in the circumstances, and obviously no abuse of discretion. There is no conflict, and no need for further review of one phase of an already protracted litigation. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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